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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W. -- Room 222
Washington, DC 20554

Re: Ex Parte : CC Docket No. 96-98 - Petition of MCI for Declaratory Ruling, Filed March 13, 1997

Dear Mr. Caton:

The enclosed material is being filed today for inclusion in the record of the above referenced proceeding.

Two copies of this letter and the attachments are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Very truly yours,

Albert M. Lewis

Enclosure

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Re: Combinations Of Network Elements After The Eighth Circuit's Decision

One question raised by the Eighth Circuit's recent decision in Iowa Util. Bd. v. FCC is whether and to what extent it will adversely affect the ability of CLECs to use combinations of network elements. The answer is that the decision can potentially have these effects only when CLECs are seeking to use new combinations of elements that are not currently available in an ILEC's network. Conversely, the decision should not have any effect on a CLEC's right to obtain access to existing combinations of network elements on the same terms and conditions as the ILEC enjoys.

In particular, the Eighth Circuit vacated only the FCC rules (47 C.F.R. §§ 51.315(c)-(f)) that unconditionally required ILECs to provision CLEC requests that the ILECs create entirely new combinations of elements, and even this decision rested on a very narrow ground under the Eighth Circuit's and the FCC's interpretation of the second sentence of § 251(c)(3). By contrast, the Eighth Circuit upheld the separate FCC rule that requires ILECs to provide access to existing combinations of network elements without separating them (47 C.F.R. § 51.315(b)) and the Eighth Circuit also upheld a host of other rules that give CLECs the right to obtain access to combinations of network elements on the same terms as the ILEC enjoys. E.g. id., § 51.313(b). Indeed, it would be blatantly discriminatory and unjust and unreasonable if ILECs were to disassemble existing combinations of elements only when CLECs requested them and thereby to require CLECs alone to incur the delays, inconvenience, and expense of recreating combinations that already exist. The only purpose of such a requirement would be to impede the CLECs' efforts to compete.

In this regard, ILECs did not even argue to the Eighth Circuit that the Act gave them the right to engage in such conduct. In all events, two separate provisions of § 251 authorize the FCC regulations that prohibit that anticompetitive conduct.

First, 47 C.F.R. § 51.315(b) and other parallel FCC regulations are authorized by the Eighth Circuit's interpretation of the second sentence of § 251(c)(3). The Eighth Circuit agreed with the Commission that this second sentence requires the ILEC to provide network elements in a manner that reasonably enables CLECs to do whatever combining is required to provide a telecommunications service. When elements are currently combined, no conduct by the LEC is necessary to discharge this duty and the ILEC would breach it if the LEC disassembled elements that have been ordered in combination.

Second, these rules are independently authorized by the separate requirement of the first sentence of § 251(c)(3) that LECs provide "nondiscriminatory" access to network elements "on an unbundled basis" and on "terms and conditions" that are "just, reasonable, and nondiscriminatory." As the Commission has repeatedly held in the past and as the local competition rules provide, the duty to provide access to elements on an unbundled basis means only that the ILEC must have a separately stated price for each element and provide customers the option of not purchasing particular elements. Correlatively, if a CLEC seeks to use the same combinations of elements that the ILEC currently uses, it is discriminatory and unjust and unreasonable for the ILEC to break the elements apart and make the CLEC recombine them.

1. The Eighth Circuit Vacated Only Those Unbundling Rules That Required ILECs To Create New Network Capabilities For CLECs.

In the Eighth Circuit, the ILEC petitioners did not even contend that the Act authorized them to deny CLECs access to existing combinations of network elements by breaking them apart and making the CLECs reassemble them. Rather, the only argument that they directly made was that the Commission's rules were invalid insofar as they required the ILECs to develop new network capabilities for CLECs. In particular, while conceding that they could be forced to take the steps necessary to give CLECs "equal" access to the incumbents' facilities, the ILECs objected to both Rule 51.315 and the separate rules that required ILECs to grant requests for superior access and interconnection on the ground that these provisions "forced" ILECs to act as "laborers" for CLECs. See GTE/BOC Br., pp. 60-62.

The Eighth Circuit expressly upheld the Commission rules that require ILECs to make the modifications to their networks necessary to provide equal access. Slip Op. at 140 n.33. The Eighth Circuit vacated only those unbundling rules that required ILECs to do the work necessary to create new network capabilities for CLECs. It vacated the rules requiring superior interconnection and access on the ground that the first sentence of § 251(c)(3) required only that the LEC provide access that is "equal" to what the LEC enjoys. Id. at 139-40.

And the Eighth Circuit similarly vacated only subsections (c)-(f) of Rule 51.315, which required, when technically feasible, the creation of new combinations of network elements that do not currently exist in ILEC networks. Specifically, upon a CLEC's request, these rules required ILECs both to combine their network elements with those of CLECs and to combine network elements within ILEC networks in new ways that do not currently exist.

In vacating these subsections, the Eighth Circuit recognized that the second sentence of § 251(c)(3) imposes a duty on ILECs that is in addition to the duty to provide nondiscriminatory access. In particular, it requires ILECs to provide this nondiscriminatory access "in a manner that allows the [CLEC] to combine the network elements in order to provide a telecommunications service." The FCC had justified subsections (c) through (f) on the ground that this statutory language required CLECs to do the actual combining only when it was reasonably possible for them to do so and the FCC found that it would be impossible for the ILEC to provide the physical access to network facilities and the technical information that CLECs would require to create new combinations of elements. Local Competition Order, ¶¶ 293-94. And the appellate briefs of the FCC and its supporting intervenors ridiculed the notion that ILECs would let CLECs work on the incumbent networks with screwdrivers.

While it vacated subsections (c)-(f) of Rule 315, the Eighth Circuit did not reject the FCC's conclusion that the ILECs can be required to create the new combinations in conditions in which it is not reasonably possible for the CLEC to do so. Nor did it reject the FCC's finding that it was generally impossible for ILECs to provide the necessary access and information. Rather, the Eighth Circuit concluded that "the fact that the incumbent LECs object to the rule indicates to us that they would rather allow entrants access to their networks" than "to do all of the work" themselves. Slip Op. at 141 (emphasis added).[1] Thus, the Eighth Circuit's holding is only that subsections (c)

[1] In these regards, the Eighth Circuit rejected the ILECs' claim that they never could be obligated to do the work required to create the combinations and that their sole duty was not to take

through (f) are overbroad in that they require incumbents to do the combining even in those circumstances in which CLECs are given the necessary information and physical access.

Accordingly, the FCC can, consistent with the Eighth Circuit's holding, take the position that Section 251(c)(3)'s second sentence requires ILECs to create new combinations of elements except in those circumstances in which CLECs are given the necessary physical access to the LEC facilities and the technical information necessary to do the combining. The FCC can and should now regard this as a requirement of § 251(c) when it rules on § 271 applications. Similarly, after the Eighth Circuit issues its mandate, the FCC could issue a new rule that explicitly so provides.

2. The Eighth Circuit Upheld The Regulations That Require Equal Access To Existing Combinations, And The First Sentence Of § 251(c)(3) Independently Requires ILECs To Provide CLECs With All Combinations Of Elements That Are Available Within Each ILEC's Network.

The narrow holding that invalidated subsections (c) through (f) has no effect on the separate FCC regulations designed to give CLECs equal access to the combinations of network elements that currently exist within ILEC networks. Indeed, in addition to its express holding that ILECs can be required to take the steps required to assure equality of access (slip op at 140 n. 33), the Eighth Circuit affirmed a host of regulations that give CLECs the right to use existing combinations of network elements on the same terms as the ILEC enjoys.

Most pertinently, the Eighth Circuit did not vacate the provisions of 47 C.F.R. § 51.315(b), which states that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." See also id., § 51.307(b); Local Competition, ¶ 324 (CLEC can choose to obtain access at one point to combinations of multiple unbundled elements that are physically connected to one another). In addition, the Eighth Circuit did not vacate a host of other regulations that require ILECs to provide CLECs with access to combinations of network elements on the same terms and conditions as the ILEC enjoys. 47 C.F.R. § 51.313(b); see id. § 51.309(a). Nor did the FCC vacate the FCC regulations that define individual network elements to include connections to adjacent elements[2] and that specifically provide that purchasers of certain elements automatically receive access to separate adjacent elements.[3]

These regulations assure that CLECs can obtain equal access to the combinations of network elements that exist within the incumbent LECs' networks. Notably, each regulation is

(..continued)
affirmative steps to prevent CLECs from creating the combinations. See Petitioners Br. of GTE and the RBOCs, pp. 60-62.

[2] See 47 C.F.R. § 51.319(a), (c), (d).

[3] See 47 C.F.R. § 51.319(e)(1)(ii) ("When a requesting telecommunications carrier purchases unbundled switching capability from an incumbent LEC, the incumbent LEC shall provide access to its signaling network from the switch in the same manner in which it obtains such access itself"); id. § 51.319(e)(2)(iii) (switch purchaser's access to call-related databases). Similarly, the Eighth Circuit specifically upheld the regulation that CLECs are entitled to obtain access to other network elements through their access to the OSS network element. Slip op at 130-34.

independently required by both the second sentence of § 251(c)(3) and its first sentence.

First, in declining to vacate Rule 315(b) and the other parallel regulations, the Eighth Circuit necessarily recognized that they impose duties that are different in kind from the provisions of §§ 51.315 (c)-(f) that the Court vacated on the basis of its interpretation of the second sentence of § 251(c)(3) of the Act. The Eighth Circuit recognized that the second sentence, at a minimum, imposes a duty on ILECs to take the steps necessary to enable CLECs to create new combinations of network elements. When the CLEC is ordering network elements that are currently combined, no affirmative steps are required for the ILEC to discharge this duty, and the Act surely requires the ILEC to refrain from engaging in sabotage by disassembling the very combinations that the CLEC has requested.

Second, quite apart from the second sentence of § 251(c)(3), the first sentence of this section imposes a duty on the ILEC to afford "nondiscriminatory access to network elements on an unbundled basis" and on "terms and conditions" that are "just, reasonable, and nondiscriminatory." The Eighth Circuit elsewhere recognized in its opinion that this duty requires the incumbents to take whatever steps are required to allow CLECs to obtain access to network elements that is "equal" to that which the ILEC enjoys -- such that the ILEC is prohibited from taking steps that would prevent the CLEC from obtaining access on terms that are just, reasonable, and nondiscriminatory.

For an incumbent to disassemble the combinations of elements that a new entrant orders and require the new entrant to incur the delay, expense, and inconvenience of recombining them epitomizes conduct that violates this duty. First, it is patently discriminatory. The incumbent LEC is able to use the network elements in combined form and does not have to take them apart and reassemble them when it provides service to a new customer. Similarly, the conduct is also unjust and unreasonable, for it serves no conceivable legitimate purpose. That is because the rates that the CLEC pays will include the full cost of creating the combinations, and the sole purpose and effect of the disassembly and reassembly that the ILECs want to require is to raise their rivals' costs and impede their ability to compete effectively.

In these regards, the first sentence of Section 251(c)(3) imposes a duty on ILECs to provide whatever combinations of network facilities are currently used in providing service to their customers, even if the ILEC would have to establish some physical connections in some situations (e.g. when the CLEC acquires a customer who just moved to the area and currently has no local service). Because the ILEC would create the necessary connections among elements if it were selected to serve the customer, its duty of nondiscrimination requires that it provide the elements in combined form to the CLEC. By contrast, under the Eighth Circuit's holding, the only situation in which an ILEC can decline to create the requested combinations is when they do not exist anywhere in its network and when the ILEC would thus be creating superior network capabilities for the benefit of a CLEC.

Finally, while no such claim was made to the Eighth Circuit, the ILECs have sought to justify this blatant discrimination on a different ground in some of the federal court appeals that they have filed from state arbitration decisions under § 252(e)(6) of the Act. In particular, they have suggested that the duty to provide network elements "on an unbundled basis" requires that they physically separate the network elements from one another before they are provided to a CLEC.

This claim is frivolous. "Unbundled" does not mean "physically separated." On the contrary, the dictionary defines "unbundle" as "to give separate prices for equipment and supporting

services; to price separately."[4] Indeed, when Congress used the term "unbundled" in § 251(c)(3), it acted against the background of literally decades of FCC and state regulatory decisions that used the term precisely this way. In particular, when these decisions directed a carrier to provide a component of service on an unbundled basis, they made it explicit that the carrier's duty was simply to state a separate price for the element and give consumers the option of declining to purchase the element from that carrier and obtaining it from another source. By contrast, when the consumer declines this option and chooses to continue to receive the element from the carrier, the carrier will charge the prescribed unbundled rate for the element and the carrier is neither required nor permitted to disassemble the element from the rest of its network and make the consumer incur the inconvenience, delay, and expense of recreating the combinations that previously existed.

That was the rule when the FCC previously ordered the provision on an unbundled basis of customer premises equipment,[5] of inside wire,[6] of features used to provide enhanced services,[7] of dedicated and switched transport,[8] and of tandem switching.[9] That was also the meaning of "unbundling" in the state commission proceedings in Illinois and New York which preceded the enactment of the 1996 Act and which ordered, or considered ordering, the unbundling of loops, ports, or other network elements.[10] The purpose of unbundling is to provide separate rates and choices for users, not to create inefficiencies for purchasers of the elements that are unbundled.

Accordingly, local competition regulations that no LEC even challenged before the Eighth Circuit defines unbundling in precisely this way. 47 C.F.R. § 307(d); see also Local Competition NPRM, ¶ 86. That is also why the Commission regulations that were adopted to implement the first sentence of § 251(c)(3) all require ILECs to provide access to network elements

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4 Webster's New Collegiate Dictionary (Merriam, 1981) (emphases added).

5 Second Computer Inquiry, 77 F.C.C.2d 384, 388, 443-44 (referring to unbundling as a "pricing practice"); Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

6 Second Report and Order, Detariffing the Installation and Maintenance of Inside Wiring, 59 Rad. Reg.2d 1143, 1151-53 (1986); NARUC v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

7 Third Computer Inquiry, 104 F.C.C.2d 958, 1064-66 (1986) ("unbundling" means that "competitors will pay only for Basic Service Elements that they use"); California v. FCC, 905 FCC.2d 1217 (9th cir. 1990); California v. FCC, 4 F.3d 1505 (9th Cir. 1991); California v. FCC, 39 F.3d 919 (9th Cir. 1994).

8 Report and Order and Notice of Proposed Rulemaking, Expanded Interconnection with Local Telephone Company Facilities,, 7 FCC Rcd 7369 (1992) ("Special Access Expanded Interconnection Order"); Second Report and Order and Third Notice of Proposed Rulemaking, Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd 7374 (1993) ("Switched Transport Expanded Interconnection Order").

9 See Switched Transport Expanded Interconnection Order, supra n.7.

10 Order Considering Loop Resale and Links and Ports Pricing, Case Nos. 95-C-0657, 94-C-0095, and 91-C-1174 (NYPSC Feb. 1, 1996); Ill. Comm. Comm'n Docket Nos. 95-0458, 95-0531.

on the same terms and conditions as the ILEC enjoys (47 C.F.R. § 313(b)) and also specifically provide that CLECs may obtain access to multiple network elements that are connected to one another at a single point of access. 47 C.F.R. § 307(b); Local Competition Order, ¶ 324.

In sum, there is no question about the lawfulness of 47 C.F.R. § 51.315(b) and the other provisions of the Commission's regulations that require incumbent LECs to give CLECs access to the combinations of network elements that currently exist within the ILEC network. These regulations reflect both the requirements of the first sentence of § 251(c)(3) and those of its second sentence.